(2)

Supreme Court, U.S.
FILED
AUG 9 1996

No. 95-1990

In the Supreme Court of the United States

OCTOBER TERM, 1995

SAL F. ALBANESE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FEDERAL ELECTION COMMISSION IN OPPOSITION AND FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

LAWRENCE M. NOBLE
General Counsel
RICHARD B. BADER
Associate General Counsel
VIVIEN CLAIR
Attorney
Federal Election Commission
Washington, D.C. 20463

17 pp

QUESTIONS PRESENTED

1. Whether petitioners have standing to challenge the constitutionality of the Federal Election Campaign Act of 1971, 2 U.S.C. 431-455, on the ground that it does not prohibit private citizens' campaign contributions to candidates for federal office.

2. Whether the courts below correctly rejected petitioners' constitutional challenge to the congressional franking privilege, 39 U.S.C. 3210.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	8
Baker v. *Carr*, 369 U.S. 186 (1962)	11
Brown v. *Board of Education*, 347 U.S. 483 (1954)	11
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2, 10
California Medical Ass'n v. *FEC*, 641 F.2d 619 (9th Cir. 1980), aff'd, 453 U.S. 182 (1981)	10
Common Cause v. *Bolger*, 574 F. Supp. 672 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983)	7, 11, 12
Flagg Bros. v. *Brooks*, 436 U.S. 149 (1978)	10
Froelich v. *FEC*, 855 F. Supp. 868 (E.D. Va. 1994), aff'd, 57 F.3d 1066 (4th Cir. 1995)	9
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	8, 9
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972)	10
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)	9
United States v. *Hays*, 115 S. Ct. 2431 (1995)	8
Whitmore v. *FEC*, 68 F.3d 1212 (9th Cir. 1995), cert. denied, 116 S. Ct. 1543 (1996)	8

Constitution and statutes:

U.S. Const.:	
Art. I	5, 6
Amend. I	2, 5, 6

Constitution and statutes—Continued:

	Page
Amend. V	5, 6
Federal Election Campaign Act of 1971, 2 U.S.C. 431-455	2
2 U.S.C. 437c(b)(1)	3
2 U.S.C. 437d(a)	3
2 U.S.C. 437d(e)	3
2 U.S.C. 437f	3
2 U.S.C. 437g	3
2 U.S.C. 437g(a)(1)	3
2 U.S.C. 437g(a)(2)	3
2 U.S.C. 437h	3
2 U.S.C. 441a	2
2 U.S.C. 441a(a)	3
2 U.S.C. 441b(a)	3
2 U.S.C. 441c(a)	3
2 U.S.C. 441e	3
2 U.S.C. 441f	3
2 U.S.C. 441g	3
39 U.S.C. 3210	5, 11
39 U.S.C. 3210(a)(1)	3
39 U.S.C. 3210(a)(2)	3
39 U.S.C. 3210(a)(4)	3
39 U.S.C. 3210(a)(5)(C)	3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1990

SAL F. ALBANESE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR FEDERAL ELECTION COMMISSION IN OPPOSITION AND FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 78 F.3d 66. The opinion of the district court (Pet. App. 9a-33a) is reported at 884 F. Supp. 685.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1996. The petition for a writ of certiorari was filed on June 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. 431-455, primarily to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley* v. *Valeo*, 424 U.S. 1, 26 (1976) (per curiam). Congress sought to achieve that goal by, *inter alia*, limiting the amount of money that any individual or political committee may contribute to a candidate for federal office or to a political committee. 2 U.S.C. 441a. That limitation "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free * * * to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Buckley*, 424 U.S. at 28. This Court has held that the FECA's specific limitations on the size of campaign contributions serve the compelling governmental purpose of preventing the "actuality and appearance of corruption" without unnecessary infringement of First Amendment rights. *Id.* at 26.[1]

As relevant here, the FECA (1) places dollar limitations on contributions by individuals and multicandidate political committees to candidates for federal

---

[1] The Court in *Buckley* also upheld the FECA's disclosure requirements, which help, *inter alia*, to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. at 67 (footnote omitted). The Court struck down FECA provisions that limited expenditures by candidates from their own personal funds, limited total expenditures by candidates on their campaigns, and limited the amount of independent expenditures.

office and their political committees, 2 U.S.C. 441a(a); (2) prohibits congressional campaign contributions by national banks, corporations, labor organizations, and government contractors, 2 U.S.C. 441b(a), 441c(a); (3) prohibits contributions by foreign nationals, 2 U.S.C. 441e; (4) prohibits a person from making a contribution in the name of another, 2 U.S.C. 441f; and (5) limits the size of contributions made in cash, 2 U.S.C. 441g. The FECA neither requires candidates and their committees to accept, nor prohibits them from accepting, contributions from private persons, acting either individually or through political committees. Similarly, the FECA neither requires private persons to contribute to candidates for federal office nor prohibits them from doing so.

Respondent Federal Election Commission (FEC or Commission) is the independent federal agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1), to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2), to initiate civil actions in the federal courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1) and 437d(e), and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

2. Members of Congress are permitted to send "franked" (*i.e.*, postage free) mail "in order to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States." 39 U.S.C. 3210(a)(1). The statute governing use of the franking privilege states that

> such official business, activities, and duties cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the requesting of the views of the public * * * as a guide or a means of assistance in the performance of those functions.

39 U.S.C. 3210(a)(2). The franking privilege does not extend to "matter which in its nature is purely personal to the sender or to any other person and is unrelated to the official business, activities, and duties of the public officials covered," 39 U.S.C. 3210(a)(4), or to "mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office," 39 U.S.C. 3210(a)(5)(C).

3. Respondent Susan Molinari has represented New York's 13th Congressional District since 1990. Pet. App. 3a. In 1992, respondent defeated petitioner Sal Albanese, the Democratic Party's nominee, in the general election. *Id.* at 4a. Petitioner decided not to run for Congress in 1994 because he believed that he would be unable to raise enough money to conduct an effective campaign. *Ibid.* The other petitioners are registered voters of the 13th District who allege that they voted for Albanese in 1992 and that they would have supported him again if he had run in 1994. *Id.* at 4a, 12a. They claim to have financial resources too

modest to enable them to make substantial contributions of money to political campaigns. *Id.* at 5a.

Petitioners' amended complaint alleged that the "wealth primary," defined as "the exclusionary process of soliciting and using private dollars as a way to select candidates in federal elections," C.A. App. 27a, violates several provisions of the Constitution, see *id.* at 24a-25a, 27a-28a. The complaint also alleged that unspecified provisions of the FECA violate Article I and the First and Fifth Amendments by "allow[ing] for the solicitation and use of private money in federal elections." *Id.* at 26a. Petitioners also alleged that the congressional franking statute, 39 U.S.C. 3210, violates the same constitutional provisions "unless and until equal funds are appropriated to all declared qualified congressional challengers for use in making their views known to the electorate." C.A. App. 27a. Finally, they alleged that the salary, staff, and other assistance provided to respondent Molinari as a Member of Congress are unconstitutional subsidies to respondent as a candidate for re-election "unless and until such subsidies are shared equally by all other candidates for congressional office." *Ibid.*

The complaint alleged that the "exclusionary campaign finance process" or "wealth primary" (see, *e.g.*, C.A. App. 10a, 22a) had injured petitioner Albanese as a congressional candidate in 1992 because he lacked personal wealth and the access to wealth that assertedly are necessary for electoral success. The complaint alleged that respondent Molinari had received greater financial support than had petitioner, and that respondent had used those funds to finance communications that "drowned out" petitioner's own communications. *Id.* at 20a, 25a. The complaint further alleged that petitioner Albanese had decided not to

run again in 1994 because the "wealth primary" would prevent his "meaningful and equal participation as a candidate in the electoral process." *Id.* at 22a-23a.

Petitioners also alleged that they had been injured as registered voters. The solicitation and expenditure of contributions by congressional candidates in their district, the complaint alleged, violated petitioners' First and Fifth Amendment rights, C.A. App. 10a, 26a, and deprived them of their right to a United States House of Representatives "composed of Members chosen * * * by the people of the several States," in violation of Article I of the Constitution, C.A. App. 25a. The amended complaint sought a declaration that the "wealth primary" violates Article I and the First and Fifth Amendments (*id.* at 27a-28a); a declaration that the FECA is similarly unconstitutional "insofar as it allows for the solicitation and use of private money in federal elections" (*id.* at 28a); and a declaration that the congressional franking statute is unconstitutional "unless and until equal funds are appropriated to all declared qualified congressional challengers for use in making their views known to the electorate." *Ibid.*

4. The district court dismissed the amended complaint. Pet. App. 9a-33a. The court first held that petitioners lack standing to pursue their constitutional challenge to the FECA because "[t]he FECA's contribution limits cannot be directly traced to be the cause of Albanese's decision not to run for Congress," *id.* at 23a, and because petitioner Albanese had "opted not to participate in the election process; he was not prevented from doing so," *id.* at 24a. The case was therefore distinguishable, the court held, from prior cases in which "a candidate seeking to run for office was actually excluded by, typically, an insurmount-

able filing fee." *Ibid.* The court also found that petitioners had failed to establish the likelihood that a favorable judicial ruling would redress their alleged injuries. It explained that "if [petitioners'] goal is to eliminate the contribution of private funds to politicians and thereby level the electoral playing field, declaring the FECA—a statute which *limits* such contributions—unconstitutional cannot be said to redress [petitioners'] injury." *Id.* at 25a. The court also noted that petitioners' challenge to the FECA lacks merit, observing that "[t]he Court's reasoning in *Buckley* suggests that the essence of [petitioners'] challenge to the FECA has been considered and rejected by the Supreme Court." *Id.* at 25a-26a.

The district court also rejected petitioners' challenge to the franking privilege. In light of petitioner Albanese's decision not to run for Congress in 1994, the court deemed it "reasonable to suggest that * * * [petitioners'] challenge to the frank should be dismissed for lack of standing as was their challenge to the FECA." Pet. App. 29a. Even if petitioners were found to have standing, the court held, their claim lacks merit. *Ibid.* Relying on *Common Cause* v. *Bolger*, 574 F. Supp. 672 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983), the court concluded that "[t]he conceded and undisputed legitimate interests [namely, consistent communication between citizens and their elected representatives] promoted by the franking statute are sufficient to justify the limited impacts on the rights of" petitioners. Pet. App. 31a (quoting *Common Cause*, 574 F. Supp. at 683).

5. The court of appeals affirmed. Pet. App. 1a-8a. The court concluded that petitioners lack standing to challenge the FECA. The court explained that "the injury [petitioners] assert is not 'fairly traceable' to

FECA" because "FECA does not require that contributions be made to any candidate." *Id.* at 6a. The court also found that petitioners had failed to show that their asserted injuries were likely to be redressed by a favorable ruling. "Indeed," the court observed, "since FECA limits the amount of contributions that are permissible, the elimination of those ceilings could well place candidates whose constituencies do not include a plethora of wealthy supporters at an even greater disadvantage." *Ibid.* The court did not discuss petitioners' challenge to the franking privilege, but it noted in its conclusion that it had "considered all of [petitioners'] arguments on this appeal and ha[d] found them to be without merit." *Id.* at 8a.

ARGUMENT

1. In order to establish standing to sue in federal court, a plaintiff must demonstrate (1) an "injury in fact" that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) that there is a "causal connection between the injury and the conduct complained of"; and (3) that it is "likely," as opposed to "merely speculative," that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted). See also, *e.g.*, *United States* v. *Hays*, 115 S. Ct. 2431, 2435 (1995); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

The decision of the court of appeals in this case that petitioners lack standing is consistent with decisions of other courts addressing similar claims. See, *e.g.*, *Whitmore* v. *FEC*, 68 F.3d 1212 (9th Cir. 1995) (dismissing for lack of standing constitutional challenge to out-of-congressional-district campaign contribu-

tions and to the FECA for failing to prohibit such contributions), cert. denied, 116 S. Ct. 1543 (1996); *Froelich* v. *FEC*, 855 F. Supp. 868 (E.D. Va. 1994) (similar), aff'd, 57 F.3d 1066 (4th Cir. 1995) (Table) (per curiam). No provision of the FECA has caused any injury to petitioners, and petitioners would not be better off if they received a judicial declaration that the FECA, or any provision of it, is unconstitutional.[2]

a. Rather than being "fairly traceable" to the Commission or the FECA, the contributions from which petitioners claim to have suffered injury were the result of independent, voluntary decisions by private persons. Individuals decided to contribute to respondent Molinari, and she in turn determined the manner in which those contributions would be spent. Petitioners have therefore failed to allege facts showing that their alleged injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Petitioners' challenge presumes that because the FECA regulates the amount and form of certain campaign contributions, it "authorizes," "control[s]," or "sanction[s]" (Pet. 18, 19) those contributions that it does not prohibit. This Court has made clear, however, that private conduct cannot be transformed into unconstitutional government action "by the simple

---

[2] Petitioners fail to identify any particular provision of the FECA that they contend violates the Constitution. Instead, they rely on the conclusory assertion that the FECA "sanction[s] and control[s]" the "exclusionary campaign finance system" used in congressional elections. Pet. 19.

device of characterizing the [government's] inaction as 'authorization' or 'encouragement.'" *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164-165 (1978). See also *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 391-394 (1972) (political committees predated the FECA); *California Medical Ass'n* v. *FEC*, 641 F.2d 619, 623 n.2 (9th Cir. 1980) (en banc) (contributions by individuals to political committees were not limited until passage of the FECA), aff'd, 453 U.S. 182 (1981). Cf. *Buckley*, 424 U.S. at 101 ("[p]lainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates").

b. Petitioners have also failed to allege facts suggesting that their injuries would be redressed by a favorable judicial decision. They have identified no provision of the FECA the invalidation of which would redress their injuries. Rather, they have sought a declaration that the FECA is unconstitutional "insofar as it allows for the solicitation and use of private money in federal elections." C.A. App. 28a. A judicial declaration that the Act (or any part of it) is unconstitutional would not alleviate petitioners' alleged injuries, however, since it would not prevent private citizens from contributing to respondent Molinari or to other congressional candidates. To the contrary, as the court of appeals pointed out (Pet. App. 6a), invalidation of the FECA would simply permit contributors to donate even larger amounts of money to candidates.

Petitioners' alleged injury could be redressed only by the enactment of more stringent statutory limitations on campaign contributions than the FECA currently imposes. The courts below, however, could not have directed Congress to enact new legislation, and

it is entirely speculative whether and how Congress would act in response to a judicial declaration entered in a suit against the Commission. Because petitioners' alleged injuries could not have been redressed by a favorable judicial decision, the court of appeals correctly held that petitioners lack standing to pursue their claims.

Petitioners' reliance (see Pet. 19) on malapportionment cases such as *Baker* v. *Carr*, 369 U.S. 186 (1962), and civil rights cases such as *Brown* v. *Board of Education*, 347 U.S. 483 (1954), is misplaced. In those cases, the Court struck down specific statutory provisions that caused concrete injury to the plaintiffs. Petitioners, however, seek a judicial declaration that a statute that causes no injury to them is invalid because it fails to prohibit the conduct of others.

2. Petitioners also contend (Pet. 9-12) that the courts below erred in rejecting their constitutional challenge to the congressional franking privilege. They assert that the decisions below conflict with the decision of the three-judge court in *Common Cause* v. *Bolger*, 574 F. Supp. 672 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983). Petitioners' argument is incorrect.[3]

Plaintiffs in *Common Cause*, like petitioners here, contended that the congressional franking privilege confers an unconstitutional electoral advantage upon incumbent Members of Congress. The three-judge

---

[3] The Federal Election Commission has no role in the administration of the congressional franking privilege. The Commission took no position in the court of appeals regarding the constitutionality of 39 U.S.C. 3210, and it takes no position on that question in this Court. The argument on that question is presented on behalf of the United States as amicus curiae, which of course has an interest in defending Acts of Congress against challenges to their constitutionality.

court observed that it "d[id] not regard the issue of standing as a frivolous one and acknowledge[d] that there may be a legitimate concern over whether plaintiffs' limited showings are sufficient to establish standing." 574 F. Supp. at 679 n.11. The court nevertheless considered plaintiffs' claims on the merits and upheld the franking statute against the constitutional challenge, concluding that the line drawn by Congress between "official" and "unofficial" uses of the frank was a reasonable one. *Id.* at 683-685.

In the instant case, the district court suggested that petitioners' standing was doubtful in light of petitioner Albanese's decision not to run for Congress in 1994. Pet. App. 29a. Like the court in *Common Cause*, however, the district court proceeded to consider and reject petitioners' challenge on the merits. *Id.* at 29a-31a. The district court's approach was fully consistent with that of the three-judge court in *Common Cause*. The court of appeals did not discuss petitioners' challenge to the franking statute, but simply observed in its conclusion that it "ha[d] considered all of [petitioners'] arguments on this appeal and ha[d] found them to be without merit." *Id.* at 8a. That disposition creates no conflict in authority and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

LAWRENCE M. NOBLE
General Counsel
RICHARD B. BADER
Associate General Counsel
VIVIEN CLAIR
Attorney
Federal Election Commission

AUGUST 1996